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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 20

SAFE DEPOSIT AND TRUST COMPANY
OF BALTIMORE, MARYLAND,
Appellant-Petitioner,
vs.
THE COMMONWEALTH OF VIRGINIA,
Appellee-Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

W. W. MARTIN,
HENRY R. MILLER, JR.,
Counsel for Appellee-Respondent.

LEWIS PRINTING CO., INC., RICHMOND, VA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 618

SAFE DEPOSIT AND TRUST COMPANY
OF BALTIMORE, MARYLAND,
Appellant-Petitioner,
vs.
THE COMMONWEALTH OF VIRGINIA,
Appellee-Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

A

PETITIONER IS AN IMPROPER PARTY

The Appellant-Petitioner is an improper party to these proceedings and is not entitled to a writ of certiorari for

the reason that it has not been and cannot be affected by these proceedings and has no material interest herein.

The suit was first instituted in the name of "Trust Company of Norfolk, Virginia, and The Safe Deposit and Trust Company of Baltimore, Maryland, Guardian and Trustees for L. J and E. P. Kellam" (R., 1).

The taxes were ordered by the Circuit Court of Accomac county, Virginia, to be assessed against "The Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam and Carrie P. Kellam, Guardian of L. J. and E. P. Kellam" (R., 3).

The Special Court of Appeals of Virginia, by its first decision, amended the assessment of the Circuit Court by striking therefrom the words: "and Carrie P. Kellam, Guardian of L. J. and E. P. Kellam" (R., 18).

This amended assessment was adhered to by the Special Court of Appeals upon the rehearing (R., 29).

The final judgment of the Special Court of Appeals (R., 30), from which the appeal was taken and which forms the basis of the petition for a writ of certiorari, together with the orders referred to above (R., 3, 18 and 29), show conclusively that the proper party appellant or petitioner is "The Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam," and not that company in its individual capacity.

See *United States ex rel State of Louisiana* v. *Boarman,* 244 U. S. 397.

Estis v. *Trabue,* 128 U. S. 225

Inglehart v. *Stansbury,* 151 U. S. 68.

American Baptist Home Mission Society v. *Barnett et al.*, 26 F. (2d) 350.

The assessment and the taxes imposed thereunder against the Trustee do not deprive the appellant-petitioner of any property without due process of law. The appellant-petitioner has no beneficial interest in the property, is compelled, under the terms of the trust deed, to pay out of the fund such taxes as may be charged thereon (R., 6), and is merely the holder of the bare legal title.

B

THE TAXES WERE ASSESSED WITH DUE PROCESS OF LAW

The tax is imposed by Virginia upon two of her residents on account of intangible personal property owned by them.

The highest Virginia court has held that the deed of trust conferred on the two sons an absolute gift subject to be divested upon a condition subsequent (R., 28). The mere remote possibility of a reverter, by the death of the two sons under twenty-five years of age and without issue, does not affect the vested estates of the sons. Until that event happens, the sons own the property. And such property is taxable by Virginia.

See *Fidelity & Columbia Trust Co.* v. *City of Louisville, Ky.*, 245 U. S. 54.

Blotgett v. *Silberman*, 277 U. S. 1.

C

BROOKE CASE DISTINGUISHED

The Special Court of Appeals of Virginia, in its exhaustive opinion herein by Crump, P., (R., 21) carefully considered and discussed *Brooke* v. *Norfolk*, 277 U. S. 27, and (R., 24, 28) held that this case was distinguished from the *Brooke Case* in that here the two sons were the owners of the property, as set out under B, *supra*, while Mrs. Brooke had no interest in the property involved in that case.

CONCLUSION

It is, therefore, respectfully submitted that this case is not one calling for the exercise by this court of its supervisory powers, for the reason that no right, title, privilege or immunity under the Fourteenth Amendment of the Constitution of the United States has been denied to petitioner, and the appeal should be dismissed and the petition for a writ of *certiorari* should be denied.

W. W. MARTIN,
HENRY R. MILLER, JR.,
Counsel for Appellee-Respondent.

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BRIEF ON BEHALF OF APPELLEE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 20

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND, *Appellant*

vs.

THE COMMONWEALTH OF VIRGINIA, *Appellee*

APPEAL FROM THE SPECIAL COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

W. W. MARTIN,
HENRY R. MILLER, JR.,
Counsel for Appellee.

(33,927)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 618

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND, *Appellant*

vs.

THE COMMONWEALTH OF VIRGINIA, *Appellee*

BRIEF ON BEHALF OF APPELLEE

STATEMENT OF THE CASE

Appellant has, on pages 3, 4, 5 and 6 of its Brief, correctly stated the facts in the case and quoted the pertinent provisions of the deed of trust and the Appellee, in

the interest of brevity, will not repeat such statement and quotation.

It is also correctly stated by Appellant that the Special Court of Appeals decided that the word "owner," in Section 2307 of the Code of Virginia of 1919 (R., p. 12), is correctly interpreted when it is used to denote those who bear to the *entire corpus* of the trust fund such relationship as is borne to it by Appellant's *cestuis* and the donor's estate.

The Appellee asserts that such an interpretation renders the application of the statutes to the facts herein and to the assessment of the taxes constitutional.

As to such interpretation of the Virginia statute, Appellant, on page 7 of its brief, makes the following statement:

> "It is the Appellant's contention that so interpreted the Statute is void for unconstitutionality. The case is as if some statute to the effect that 'all property held outside the state shall be taxed to the owner' had been construed by the lower court to mean that the Commonwealth could, despite the due process clause, tax its citizen on land owned by him and situated in another state."

It is inconceivable how such a conclusion can be fairly drawn from the decision of the Special Court of Appeals. The Appellant has apparently disregarded the fundamental difference between land and intangible personalty, with regard to taxation thereof. The location of intangible personalty is immaterial in the assessment there-

of to the owner, while the location of land is all important.

Before arguing the validity of the assessment upon the merits of the case (*post.* p. 4), the Court's attention is directed to the procedure which has been had herein.

A.—AS TO PROCEDURE

Petitioner is an Improper Party

The Appellant is an improper party to these proceedings for the reason that it has not been and cannot be affected by these proceedings and has no material interest herein.

The suit was first instituted in the name of "Trust Company of Norfolk, Virginia, and The Safe Deposit and Trust Company of Baltimore, Maryland, Guardian and Trustees for L. J. and E. P. Kellam" (R., p. 1).

The taxes were ordered by the Circuit Court of Accomac County, Virginia, to be assessed against "The Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam and Carrie P. Kellam, Guardian of L. J. and E. P. Kellam" (R., p. 3).

The Special Court of Appeals of Virginia, by its first decision, amended the assessment of the Circuit Court by striking therefrom the words: "and Carrie P. Kellam, Guardian of L. J. and E. P. Kellam" (R., p. 18).

This amended assessment was adhered to by the Special Court of Appeals upon the rehearing (R., p. 29).

The final judgment of the Special Court of Appeals (R., p. 30), from which the appeal was taken, together

with the orders referred to above (R., pp. 3, 18 and 29), show conclusively that the proper party Appellant is "The Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam," and not that company in its individual capacity.

See *United States, ex rel State of Louisiana* vs. *Jack, Judge,* 244 U. S. 397, 402.
Estis vs. *Trabue,* 128 U. S. 225, 229, 230.
Inglehart vs. *Stansbury,* 151 U. S. 68, 71, 72.
American Baptist Home Mission Society vs. *Barnett, et al.,* 26 F. (2d) 350, 352.

The assessment and the taxes imposed thereunder against the Trustee do not deprive the Appellant of any property without due process of law. The Appellant has no beneficial interest in the property, is compelled, under the terms of the trust deed, to pay out of the fund such taxes as may be charged thereon (R., p. 6), and is merely the holder of the bare legal title.

B.—AS TO THE MERITS OF THE CASE

1. The Taxes Were Assessed With Due Process of Law

By an Act of the General Assembly of Virginia, approved April 16, 1903 (Va., Acts 1902-03-04, pp. 155, 156, 158), it was enacted that:

"* * * 3. The taxable subjects shall be classified by schedules as follows, to-wit: * * *

"Schedule C.

"8. The classifications under Schedule C. shall be as follows:

"Personal Property in Choses in Action, Etc. First. Bonds, notes and other evidences of debt, including bonds of other States * * *, and all demands and claims, however evidenced, whether secured by deed of trust, judgment, or otherwise, or not so secured. * * *"

By successive Acts of the General Assembly this section has been repeatedly amended, but the same definition of taxable intangible personal property is found in all of the laws in force during the years 1921, 1922, 1923, 1924 and 1925, for which years the assessments were made herein.

See: Va. Acts, 1918, p. 171.
Va. Acts, 1920, p. 793.
Va. Acts, 1922, p. 551.
Va. Acts, 1924, p. 468.

The two Kellam sons were the owners of intangible personal property as defined above which property was taxable under the Acts just referred to and the assessment of taxes was made accordingly.

Under the doctrine of *mobilia sequuntur personam,* approved in *Blodgett* vs. *Silberman, 277* U. S. 1, 9, Virginia may tax to its residents such property, even though the physical evidences thereof be located outside the juris-

diction of Virginia (*Fidelity & Columbia Trust Co.* vs. *City of Louisville, Ky.*, 245 U. S. 54, 58); and even though the legal title thereto be in a non-resident. (See Appellant's Brief, page 7, footnote 1.)

The question at issue here is, did the sons "own" so much of the trust fund as amounted in value to the value of the entire fund? If they did, the assessment is valid, and Virginia has not taxed to them property not owned by them and the tax is not in violation of Section 1, of the Fourteenth Amendment to the Constitution.

2. The Sons Owned the Fund

The tax is imposed by Virginia upon two of her residents on account of intangible personal property owned by them.

The highest Virginia Court has held that the deed of trust conferred on the two sons an absolute gift subject to be devested upon a condition-subsequent (R., p. 28).

The two sons took vested absolute estates in the personal property, with their enjoyment thereof postponed, such vested estates being subject to be devested upon the happening of either of the conditions subsequent. *Cropley* vs. *Cooper,* 19 Wall. 167, 177; *Carter* vs. *Keesling,* 130 Va. 655, 672.

There can be no question of the right of Virginia to tax such vested estates, and such other estates as the two sons have in the property. (Brief on behalf of Appellant, p. 11.)

It is argued, however, by Appellant that the aggregate value of the sons' interest is less than the value of the

fund, the difference being represented by (a) the interests of the unborn issue and (b) the interests of whatever persons take in the event of the death of both sons under twenty-five and without issue.

(a) *As to the Interests of the Unborn Issue*

The interests of the unborn issue of the sons are of no value. In the case of *Howbert* vs. *Cauthorn,* 100 Va. 649, Cauthorn sought, by an attachment suit, to subject the interests of Mary E. Howbert in realty to the payment of her bond held by him. The court held that the interest of Mary E. Howbert was a contingent remainder and could not be subjected to a sale.

The court said, at page 658:

> "* * * it follows, in the light of the foregoing authorities, that the appellant [Mary E. Howbert] has a contingent remainder in one moiety of the land mentioned, subject to be defeated by her death in the lifetime of Lucy Ann Thomas, when the interest would pass under the deed to others.
>
> "The second branch of the case involves the question whether or not such an unsubstantial and shadowy right as that held by the appellant can be subjected to sale for the benefit of her creditors. Such an interest is a pure contingency—a bare possibility whether it will ever exist or not. During the life of Lucy Ann Thomas such an interest hardly arises to the dignity of an estate. On the part of a purchaser, at a judicial sale, it would be a perfect

> hazard, for it could not be known to any one whether the supposed interest, being sold, would ever be of any value. It would be a mere speculative transaction and ruinous in its consequences, not only to the creditors, but to all parties interested."

Such a remainder was involved in *Young* vs. *Young*, 89 Va. 675, 678, and the Virginia court said:

> "At common law, it is true, a ***naked possibility***, such as this remainder, which was uncertain as to the person, could not be the subject of assignment or conveyance."

It is true that by statute in Virginia now, such an interest as was involved in either of these two cases may be disposed of by deed and even in the absence of statute, a deed of such interest might operate as an estoppel. But the *"naked possibility"* is not thereby given any value.

In the *Howbert* and *Young Cases, supra*, some of the remaindermen were *in esse*. Here the remaindermen are yet unborn (Appellant's Brief, p. 5). The interests of the unborn issue are thus dependent upon a double contingency—birth of issue, death of the issue's father under twenty-five—and are thereby reduced from a *"naked possibility"* to a *"strong improbability."*

Then, too, the assessment of a property tax is made upon the basis of the value of the property at a definite day in the past, not upon the value of the property in the future. On the dates that these assessments were made, the two sons were the owners of the absolute estate in

the personalty. They were both alive without issue and there was, therefore, no derogatory estate in any one else.

(b) *As to Interests of Those Taking in Event of Death of Sons Under Twenty-five, Without Issue*

The possibility of death of both sons under twenty-five, without issue, does not defeat the assessment. Should such event happen, the property would descend to the heirs of the one dying second, or pass under his will to his legatees. As to this contingency, the deed of trust is silent and there can be no estate in other persons by way of limitation upon such event, save by implication, and such limitations are not favored and the courts will incline against their creation either by devise or by deed, when the words employed are not clear and definite. *Brewster* vs. *McCall*, 15 Conn. 274, 291. In the absence of all reference to such an event, and when it was the intent of the grantor in the deed to give to the beneficiaries an absolute estate (R., p. 28), it should be held that the happening of the contingency (death of both sons under twenty-five without issue) does not affect the estate already created by the death of the first son, which estate is (1) an absolute estate in the then surviving son, or (2) a reversion in the grantor in the deed. Both (1) and (2) are represented by residents of Virginia (R., pp. 2, 28. Appellant's Brief, p. 5), and Virginia may therefore tax those interests and include such tax in the assessment made against the Trustee (R., pp. 3, 18, 29),

who is directed to pay all taxes chargeable on the property (R., p. 6).

3. Brooke Case Distinguished

The Special Court of Appeals of Virginia, in its exhaustive opinion herein by Crump, P. (R., p. 21), carefully considered and discussed *Brooke* vs. *Norfolk, 277* U. S. *27,* and (R., pp. 24, 28) held that this case was distinguished from the *Brooke Case* in that here the two sons were the owners of the property, as set out under 1 and 2, *supra,* while Mrs. Brooke had no interest in the property involved in that case.

C.—CONCLUSION

It is, therefore, asserted by the Appellee that such interests in the trust fund as may be in persons other than the two Kellam sons are of no value; that Virginia has imposed the taxes upon residents of Virginia on account of property owned by them and having a value equal to the assessment; that such assessment is valid and that the judgment of the Special Court of Appeals of Virginia should be affirmed.

W. W. Martin,

Henry R. Miller, Jr.,

Counsel for Appellee.